



HIPAA/STATE LAW PREEMPTION FACT SHEET

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EXPLANATION

The following fact sheet is a tool designed to assist HIPAA-covered persons and entities in understanding preemption of State law by the Health Insurance Portability and Accountability Act (HIPAA).

Please forward any comments, corrections, etc. to the attention of:

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Fact Sheet -- HIPAA Preemption of State Law

- HIPAA privacy regulations set a minimum federal standard for protecting patient privacy. However, the laws that entities covered by HIPAA must follow (including State agencies) will actually be some combination of HIPAA and California patient-privacy laws. This is because of the preemption provisions in HIPAA. These provisions mandate that HIPAA preempts all “contrary” State privacy laws, except for a few “carve-out” exceptions and in cases where the State law is “more stringent” than the HIPAA privacy requirement. (See CalOHI Preemption Analysis Methodology.)
- 50 states = 50 different combinations of HIPAA and state law. It will need to be determined by covered entities which laws—HIPAA or State privacy laws (or particular provisions thereof) will apply to them. Covered entities must comply with whichever *provision* of State law is stricter, i.e., if the HIPAA regulation is more stringent than the State law, with the exception of one provision, covered entities will have to comply with the HIPAA regulation *and* the provision in the State law which gives the patient greater privacy protection(s).
- The ultimate combination of HIPAA and State law will only apply to entities which are covered by HIPAA. CalOHI has now determined that 10 State departments are covered entities under HIPAA (and many more are impacted by it even though not technically covered).
- Due to the complexity and ambiguity of federal regulations, and the vast amount of State privacy law which must be analyzed (particularly in California), the HIPAA preemption analysis is considered to be one of if not the most challenging aspects of HIPAA implementation. The analyses are also not static—current State laws may be amended and new laws promulgated which will necessitate re-analyses at least annually. In addition, HIPAA itself has been amended twice since issuance of the Privacy Rule in December, most recently in August of 2002.
- The California Constitution, Article III, Section 3.5 mandates that “An administrative agency...has no power:...[t]o declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.”

- To make sure that covered State agencies will be able to enforce the appropriate laws—HIPAA provisions which preempt State law or State law which is more stringent or otherwise not preempted by HIPAA—Governor Davis signed into law Senate Bill 1914 on September 11, 2002 that will add Health and Safety Code Section 130331.5. CalOHI worked with the Senate Insurance Committee on crafting the language for S.B. 1914, which, among other things (see next bullet), provides that any State law determined by CalOHI to be preempted shall not be applicable to the extent of that preemption and that the remainder of the State law shall remain in full force and effect. The language in the new law is designed to allow State departments and agencies to follow State health information privacy/access laws, but only to the extent these laws are not preempted by HIPAA.
- New Health and Safety Code Section 130331.5 also provides that CalOHI shall assume Statewide leadership, coordination, direction and oversight for determining which provisions of State law governing personal medical information are preempted by HIPAA. In addition, pursuant to Section 130331.5, State departments impacted by HIPAA shall assist CalOHI in determining which State laws concerning personal health information impact their departments and shall conform to determinations made by CalOHI on HIPAA preemption issues. (See CalOHI Policy Memoranda 2002-17.)
- States may, through their Governors, request an “exception determination” from federal HHS, with respect to a particular law, under certain circumstances. While the request for an exception determination is pending, covered entities must comply with HIPAA provisions. (See CalOHI Preemption Analysis Methodology.)
- Extensive legislative action may be required depending on the results of the preemption analyses.
- CalOHI has accomplished, and is currently undertaking, a number of activities to assist covered entities in the State in determining HIPAA preemption of California law. Most importantly, CalOHI has taken the lead in completing preemption analyses of the major Statewide privacy laws, including the California Information Practices Act—the main privacy statute governing State agencies, the California Public Records Act, and the Confidentiality of Medical Information Act—the primary medical information privacy law in California. These analyses have and will continue to be posted to the CalOHI website for review, comment and

consensus by covered entities and other interested parties.

- CalOHI has also accomplished, or is in the process of accomplishing the following activities to further assist covered entities in the State in determining HIPAA preemption of California law:
 - Developed HIPAA preemption expertise including interpretation and analysis of new federal regulations and determined a common methodology to be used to analyze HIPAA preemption of California law. (See CalOHI Preemption Analysis Methodology.)
 - Developed and maintain a Legal Issues page on the CalOHI website at www.ohi.ca.gov for dissemination of preemption issues and materials and other legal HIPAA issues.
 - Developed a number of preemption analysis tools which have been posted on the CalOHI website.
 - Directing all HIPAA covered State entities to: (1) identify all health information privacy laws applicable to them; and (2) analyze all of the identified laws for preemption and report results to CalOHI as requested. (See CalOHI Policy Memoranda 2002-17.)
 - Supervising legal workgroups with State, county and University of California attorneys which are currently analyzing the confidentiality portions of the Lanterman, Petris, Short Act and AIDS-related confidentiality statutes.
 - Coordinating, training and networking with other groups/individuals who are doing their own preemption analyses.
 - Keeping the Governor, the Legislature, covered/impacted State entities and others aware of CalOHI preemption determination efforts.
 - Proposing legislation to “clean up” State law where preemption conflicts and/or issues appear from preemption analysis.
 - Providing technical assistance on HIPAA and health information privacy issues to the Legislature, State departments and other persons and entities interested in or impacted by HIPAA preemption.

- Monitoring preemption-related and other health information privacy-related bills in the Legislature for HIPAA preemption conflicts.
- Formulating a process for requesting exception determinations from the Secretary of federal HHS.